

Remarks

This Application has been carefully reviewed in light of the Office Action mailed June 26, 2007. Applicants appreciate the Examiner's consideration of the Application. Applicants have made a clarifying amendment to independent Claims 1, 24, 47, and 70-71 to correct a typographical error in these claims. These amendments are not considered narrowing or necessary for patentability, and are not made in relation to any of the Examiner's rejections. Applicants believe all claims are allowable over the Examiner's rejections without amendment and respectfully provide the following remarks. Applicants respectfully request reconsideration and allowance of all pending claims.

I. The Claim Objections should be Withdrawn

The Examiner objects to the recitation of "capable of" in Claims 1, 24, and 47 as rendering these claims indefinite. Applicants respectfully disagree.

To the extent that the language in the preamble of these claims can even limit these claims and/or give rise to indefiniteness,¹ a claim limitation described as "capable of" performing certain functions covers operations that the element *is* capable of performing, and not just operations that the elements *may be* capable of performing. Applicants note that the ordinary dictionary definition of "capable" is "[h]aving capacity or ability; efficient; able." *The American Heritage College Dictionary*, 2nd College Ed., Houghton Mifflin (1991). Thus, as stated above, limitations following the term "capable of" in a particular claim limitation constitute operations that the claim limitation *is able* to perform, whether or not they are being performed at a given time.² Operations that a claim element *is able* to perform are limitations (if indeed the preamble itself is a limitation), because the element is thus distinguished from the prior art that *is not able* to perform the operations. Applicants further note that "capable of" is a commonly used term in patent application claims, and is present in claims of numerous patents issued by the United States Patent and Trademark Office. A search in the claims field of the United States Patents Database on www.uspto.gov produced well over 200,000 issued patents that include the term "capable of" in the claims. For at least

¹ Applicants do not express an opinion at this time as to whether the preamble of independent Claims 1, 24, and 47 limits these claims.

² Again, Applicants do not express an opinion at this time as to whether the preamble of independent Claims 1, 24, and 47 limits these claims.

these reasons, Applicants respectfully submit that use of the phrase “capable of” in Claims 1, 24, and 47 does not render these claims indefinite.

For at least these reasons, Applicants respectfully request that the Examiner withdraw the objections to Claims 1, 24, and 47.

II. Claim 47 Recites Patentable Subject Matter

The Examiner rejects Claim 47 under 35 U.S.C. § 101 as being directed to non-statutory subject matter. In particular, the Examiner states that Claim 47 needs to be amended and suggests inserting “by a computer” after “executed” in line 5. (Office Action at 2) Applicants respectfully disagree.

Applicants respectfully submit that the Examiner has not cited any authority nor provided any explanation as to why Applicants should be required to amend Claim 47 in the suggested manner. Applicants believe Claim 47 is directed to patentable subject matter in its current form.

The United States Court of Appeals for the Federal Circuit has recently stated that 35 U.S.C. § 101 “explains that an invention includes ‘any new and useful process, machine, manufacture or composition of matter.’ Without question, software code alone qualifies as an invention eligible for patenting under these categories, at least as processes.” *Eolas Technologies, Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1338-39 (Fed. Cir. 2005) (citations omitted) (emphasis added). Claim 47 is directed to software embodied in computer-readable media that when executed is operable to perform the limitations recited in the body of the claim. Applicants respectfully submit that the claims are statutory.

Moreover, the M.P.E.P. states that “functional descriptive material consists of data structures and computer programs which impart functionality when employed as a computer component.” M.P.E.P. § 2106.01. “When functional descriptive material [i.e., computer programs, according to above-cited portion of the M.P.E.P.] ***is recorded on some computer-readable medium***, it becomes structurally and functionally interrelated to the medium ***and***

will be statutory in most cases since use of technology permits the function of the descriptive material to be realized.” *Id.* (emphasis added). This portion of the M.P.E.P. makes clear that the M.P.E.P. contemplates and, in fact, authorizes claims directed to software embodied in a computer-readable medium and operable to perform certain functions. The manner in which Applicants have drafted these claims is clearly contemplated by the M.P.E.P. as being statutory.

For at least these reasons, Applicants respectfully submit that Claim 47 and its dependent claims are directed to patentable subject matter and requests reconsideration and allowance of Claim 47 and its dependent claims.

III. Allowable Subject Matter

Applicants note with appreciation the allowance of Claim 71. Applicants do not admit to any characterization or limitation of the claims by the Examiner, particularly any that are inconsistent with the language of the claims considered in their entirety and including all of their constituent limitations, or to any characterization of a reference by the Examiner.

Applicants note with appreciation the Examiner’s indication that Claims 2-11, 14-18, 22-23, 25-34, 37-41, 45-46, 48-57, 60-64, and 68-69 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. However, due to the clear distinctions between independent Claims 1, 24, and 47 and *Fitton*, Applicants have chosen not to rewrite any of Claims 2-11, 14-18, 22-23, 25-34, 37-41, 45-46, 48-57, 60-64, and 68-69 in independent form at this time. Furthermore, as demonstrated above, Applicants respectfully submit that these claims are allowable at least because they depend from allowable independent claims.

IV. The Claims are Allowable over Fitton

The Examiner rejects Claims 1, 12-13, 19-21, 24, 35-36, 42-44, 47, 58-59, 65-67, and 70 under 35 U.S.C. § 102(e) as being anticipated by WO 03/021886 A2 by *Fitton et al.*

(“*Fitton*”). Applicants respectfully traverse these rejections and discuss independent Claim 1 as an example.

It does not appear to Applicants that the cited portions of *Fitton* disclose, teach, or suggest a first node that is operable to “receive a probe message from a second node, the probe message comprising values for one or more node variables for the second node,” and to “compare the values for the one or more node variables for the first node to the values for the one or more node variables for the second node within the probe message to determine, independent of a centralized controller associated with the network, whether the first node should set itself to a new channel,” as recited in Claim 1.

The cited portions of *Fitton* appear to disclose that a device in a network of devices may initiate channel reselection if the device determines that the quality of service of its current channel drops below a predetermined threshold. (*See Fitton* at 7) The cited portions of *Fitton* disclose a number of parameters that may be used to measure the quality of service of the channel. (*Id.*) The cited portions of *Fitton* disclose that the device comprises comparison means for determining if the measured signal quality exceeds a predetermined value. (*Fitton* at 1) If the device determines that the channel quality is inadequate, then the device may initiate channel reselection. (*See Fitton* at 1-2, 7, and 21) Therefore, according to the cited portions of *Fitton*, a device’s decision of whether to switch to a new channel appears to be made simply based on a comparison of the quality of service of the current channel to a threshold value.

It does not appear to Applicants that the cited portions of *Fitton* disclose, teach, or suggest a first that is operable to “receive a probe message from a second node, the probe message comprising values for one or more node variables for the second node,” and to compare “*the values for the one or more node variables for the first node*” to “*the values for the one or more node variables for the second node within the probe message*” to *determine*, independent of a centralized controller associated with the network, *whether the first node should set itself to a new channel*,” as recited in Claim 1. For example, in the cited portions of *Fitton*, it appears to Applicants that a node, in order to determine whether it

should set itself to a new channel, simply compares a measured signal quality to a predetermined value to determine if the measured signal quality exceeds the predetermined value.

For at least these reasons, Applicants respectfully request reconsideration and allowance of independent Claim 1 and its dependent claims. For at least certain analogous reasons, Applicants respectfully request reconsideration and allowance of independent Claims 24, 47, and 70 and their dependent claims.

V. No Waiver

All of Applicants' arguments and amendments are without prejudice or disclaimer. Additionally, Applicants have merely discussed example distinctions from the reference cited by the Examiner. Other distinctions may exist, and Applicants reserve the right to discuss these additional distinctions in a later Response or on Appeal, if appropriate. By not responding to additional statements made by the Examiner, Applicants do not acquiesce to the Examiner's additional statements. The example distinctions discussed by Applicants are sufficient to overcome the Examiner's rejections.

Conclusion

Applicants have made an earnest attempt to place this case in condition for allowance. For at least the foregoing reasons, Applicants respectfully request full allowance of all pending claims.

If the Examiner feels that a telephone conference would advance prosecution of this Application in any manner, the Examiner is invited to contact Chad D. Terrell, Attorney for Applicants, at the Examiner's convenience at (214) 953-6813.

Although Applicants believe no fees are due, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

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